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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 142

NOAH STEWART,

Appellant,

vs.

ROBERT KEYES ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION TO DISMISS.

T. H. WREN,
W. N. STOKES,
A. M. BEETS,
JOHN ROGERS,
JAMES C. DENTON,
RICHARD H. WILLS,
J. H. CROCKER,
I. L. LOCKEWITZ,
J. P. GREVE,
Counsel for Appellees.

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Come now Robert Keyes, T. B. Slick, D. Replogle, William G. Johnston, Echolustee Oil Corporation, Leslie Rogers, Mid-Continent Petroleum Corporation, Cosden Oil & Gas Company, Cosden & Company, National Bank of Commerce of New York City and Phillips Petroleum Company, the appellees herein, and move this Court to dismiss

with costs the appeal taken herein to this Court by the above named appellant, upon the following ground:

That all that the Supreme Court of the State of Oklahoma held and decided in the final judgment appealed from was: That appellant's action, being an action by a full-blood Creek Indian to recover possession of and quiet title to his inherited interest in the allotted lands of a deceased full-blood Creek Indian, was barred by the Statutes of Limitations of the State of Oklahoma long prior to the enactment of Section 2, Chapter 115 of the Act of Congress approved April 12, 1926 (44 Stat. 239), commonly known as the Harreld-Hastings Act; that said Act of Congress was not intended to revive any action which was theretofore subject to and barred by said Oklahoma Statutes of Limitations; and that, therefore, said Act of Congress was not applicable to appellant's action. Therefore, the allowance by the Supreme Court of the State of Oklahoma of this appeal was improvident in that in said final judgment of the Supreme Court of Oklahoma there was not drawn in question the validity of said Act of April 12, 1926, and that the decision was not against its validity, within the meaning and intent of Section 237 (a) of the Judicial Code (43 Stat. 937).

T. H. Wren,
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J. P. GREVE,
Attorneys for Appellees, Mid-Continent Petroleum Corporation, Cosden Oil & Gas Company, Cosden & Company, National Bank of Commerce of New York City, and Phillips Petroleum Company.

Service of the foregoing Motion to Dismiss Appeal is acknowledged this 23rd day of June, 1934.

WILLIAM NEFF,
Attorney for Appellant.

STATEMENT IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION.

Appellees, in support of their motion to dismiss this appeal, and pursuant to Rule 12 of the United States Supreme Court, file the following statement of the grounds upon which they contend that the Supreme Court of the United States has no jurisdiction upon appeal to review the judgment appealed from herein, to-wit:

All that the Supreme Court of the State of Oklahoma held and decided in the final judgment appealed from was: That appellant's action, being an action by a full-blood Creek Indian to recover possession of and quiet title to his alleged inherited interest in the allotted lands of a deceased full-blood Creek Indian, was barred by the Statutes of Limitations of the State of Oklahoma long prior to the enactment of Section 2, Chapter 115, of the Act of Congress approved April 12, 1926 (44 Stat. 239), commonly known as the Harreld-Hastings Act; that said Act of Congress was not intended to revive any action which was theretofore subject to and barred by said Oklahoma Statutes of Limitations; and that, therefore, said Act of Congress was not applicable to appellant's action.

It is, therefore, obvious that in the said final judgment of the Supreme Court of Oklahoma there was not drawn in question the validity of said Act of April 12, 1926, *and that the decision was not against its validity. All that the Supreme Court of Oklahoma did was to consider and construe the aforesaid Act to the extent only of holding that the same was not applicable to appellant's action. Instead of holding said Act invalid it was assumed that the same was valid.*

The appellant, in his statement in support of the jurisdiction of this Court, cites *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, and *Bunch* v. *Cole*, 263 U. S. 250, 68 L. Ed. 290, to the effect that a State court holds a State statute valid whenever it enforces the same, and argues therefrom that to hold a statute inapplicable is equivalent to holding it invalid. This is a *non sequitur*.

The validity of a Federal statute is not necessarily drawn in question merely becaues a claim is asserted thereunder nor because the court construed or interpreted the same. Longest v. *Langford*, 274 U. S. 499, 71 L. Ed. 1170; *New Orleans Land Co.* v. *Brott*, 263 U. S. 97, 68 L. Ed. 187; and Cyc. of Fed. Procedure, Vol. 5, Sections 2649, 2650, and cases cited.

In *Longest* v. *Langford, supra*, the question was whether the surviving husband of a deceased Choctaw Indian woman was, under Section 22 of the Act of July 1, 1902, Chap. 1362 (32 Stat. 641), entitled to an estate by the courtesy in and to an allotment made in the name and right of the wife under said Act, and this Court held:

> "A decision of a state court allowing the husband of a deceased Indian woman an estate by the curtesy in her land cannot be reviewed by the Supreme Court of the United States by writ of error under § 237(a) of the Judicial Code, restricting such review to cases where is drawn in question the validity of the statutes of the United States, and the decision is against the validity."

The second paragraph of the syllabus to the case of *New Orleans Land Company* v. *Brott et al., supra*, is as follows:

> "A writ of error will not lie under the Amendment of 1916 to § 237 of the Judicial Code for review by

> the Supreme Court of the United States of a state decision which unduly limited, but did not dispute, the binding effect of an act of Congress."

It will be borne in mind that in this case we are not dealing with the individual allotment of the appellant, but are dealing with his inherited interest in the allotment of his grandmother, Lizzie Toney. If we were dealing with the appellant's own allotment we would be confronted with an entirely different question.

Insofar as the lands involved herein are concerned the appellant was not a "restricted Indian," within the meaning of the Harreld-Hastings Act, nor was the appellant's interest in said lands "restricted," within the meaning of said Act. In fact, insofar as appellant's interest in said lands was concerned, the same was at all times subject to sale and was "free from restrictions". During appellant's minority or incompetency his interest in said lands was subject to sale through the proper probate court, just as the lands of any other minor or incompetent, and upon his majority and restoration to competency the same was subject to sale upon the approval of the county court having jurisdiction to settle the estate of appellant's ancestor, Lizzie Toney. *Dierks et al.* v. *Isaac et al.*, 114 Okla. 158, 244 Pac. 750; *King* v. *Mitchell*, 69 Okla. 207, 171 Pac. 725; *Chupko* v. *Chapman*, 76 Okla. 201, 170 Pac. 259; *King* v. *Shultz*, 72 Okla. 254, 180 Pac. 550; *Seiffert* v. *Jones*, 77 Okla. 204, 186 Pac. 472, 187, Pac. 223; *Stewart* v. *Burrows*, 80 Okla. 23, 193 Pac. 881; *Harjo* v. *Empire Gas & Fuel Co.*, 28 Fed. (2d) 596; *Harris* v. *Bell*, 254 U. S. 103, 65 L. Ed. 159; and Sections 1, 2, 6 and 9 of the Act of Congress of May 27, 1908 (35 Stat. 315).

Prior to the enactment of Section 2, Chapter 115 of the Act of Congress approved April 12, 1926 (44 Stat. 239), the Statutes of Limitations of the State of Oklahoma were

applicable to appellant's cause of action, if any, and by virtue of said Statutes of Limitations said action had become barred long prior, approximately five years, to the enactment of said Act. (See, for applicable Statutes of Limitations, Sections 183, 184 and 1496 of the 1921 Compiled Statutes of Oklahoma.) To the effect that said Statutes of Limitations were applicable, see *Dierks et al.* v. *Isaac et al.*, 114 Okla. 158, 244 Pac. 750; *King* v. *Mitchell*, 69 Okla. 207, 171 Pac. 725; *Chupko* v. *Chapman*, 76 Okla. 201, 170 Pac. 259 (Petition for certiorari denied, 247 U. S. 506, 62 L. Ed. 1240); *King* v. *Schultz*, 72 Okla. 254, 180 Pac. 550; *Seiffert* v. *Jones*, 77 Okla. 204, 186 Pac. 472, 187 Pac. 223; *Stewart* v. *Burrows*, 80 Okla. 23, 193 Pac. 881; *Harjo* v. *Empire Gas & Fuel Co.*, 28 Fed. (2d) 596; *Harris* v. *Bell*, 254 U. S. 103, 65 L. Ed. 159; and Sections 1, 2, 6 and 9 of the Act of Congress of May 27, 1908 (35 Stat. 315). To the effect that the Statutes of Limitations are applicable to a void as well as a voidable guardian's deed, see *Dodson* v. *Middleton et al.*, 38 Okla. 763, 135 Pac. 368; *Tiger* v. *Brown*, 130 Okla. 83, 265 Pac. 124; *Group* v. *Jones*, 44 Okla. 344, 144 Pac. 377; *Fulp* v. *Squires*, 77 Okla. 244, 187 Pac. 921; *Glory* v. *Bagby*, 79 Okla. 155, 188 Pac. 881; *Wray* v. *Howard*, 79 Okla. 223, 192 Pac. 584; *Minnehart* v. *Littlefield*, 94 Okla. 249, 222 Pac. 253; *Sandlin* v. *Barber*, 95 Okla. 112, 218 Pac. 519; *Anicker et al.* v. *Harrison et al.*, 125 Okla. 21, 256 Pac. 39; *Givens* v. *Jones*, 158 Okla. 124, 12 Pac. (2) 892; and *Washington* v. *Bartlett et al.*, 158 Okla. 218, 13 Pac. (2) 132.

The same construction which was placed upon the Harreld-Hastings Act by the final judgment of the Supreme Court of Oklahoma herein was placed upon said Act by the same Court in the following cases: *Tomlin* v. *Roberts et al.*, 126 Okla. 165, 258 Pac. 1041; *Bearhead* v. *American*

Inv. Co., 159 Okla. 84, 10 Pac. (2) 1086; and *Deere* v. *Gypsy Oil Co.*, 160 Okla. 237, 15 Pac. (2) 1086.

Respectfully submitted,

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Service of the foregoing Statement is acknowledged this 23d day of June, 1934.

WILLIAM NEFF,
Attorney for Appellant.